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No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. As a nonprofit, voluntary professional bar association, NACDL represents approximately 9,200 direct members, made up of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the state supreme courts in cases raising issues of importance to criminal defendants and the defense bar.[1]

In this case, NACDL has an interest in ensuring that no-impeachment rules, such as Colorado Rule of Evidence 606(b), are interpreted and applied in a manner consistent with a criminal defendant's constitutional right to a full and fair trial by an impartial jury.

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae*, its members or *amicus*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus*'s intention to file this brief. Letters from counsel for the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

A bare majority of the Colorado Supreme Court held that Colorado's no-impeachment rule—Colorado Rule of Evidence (CRE) 606(b)—precluded petitioner from introducing numerous statements of racial bias made by a juror during deliberations in which petitioner was convicted of three misdemeanor charges. The state supreme court ruled that CRE 606(b), which is identical to numerous state and federal evidentiary laws, is an inflexible rule that does not yield to a criminal defendant's constitutional right to a fair trial by an impartial jury.

This Court warned against that application of no-impeachment rules last Term in *Warger v. Shauers*, noting that there "may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." 135 S. Ct. 521, 529 n.3 (2014). But the majority below, in a footnote, rejected this Court's guidance as ambiguous. Pet. App. 16a n.6. The majority likewise ignored the long-established direction from this Court that no-impeachment rules such as CRE 606(b) cannot be applied inflexibly lest the "plainest principles of justice" may be violated. *McDonald v. Pless*, 238 U.S. 264, 269 (1915). And, the majority failed to recognize the prevailing view that courts can and should consider evidence of racial or ethnic bias during jury deliberations. The majority instead reasoned that "'[p]rotecting the secrecy of jury deliberations'" invariably trumps "a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias." Pet. App. 27a (Márquez, J., dissenting (quoting *id.* at 13a)). That holding is unconscionably wrong.

Racial and ethnic bias continue to pervade and undermine our criminal justice system, including jury deliberations. Voir dire is not a capable tool to identify subtle but pernicious manifestations of racial and ethnic bias. Yet lower courts have struggled to identify the proper balance between admitting statements of juror bias to ensure a fair trial and protecting jury deliberations from unnecessary intrusion by the court.

A limited intrusion into jury secrecy is warranted here to eradicate injury to the defendant, "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 18a–19a (Márquez, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). This limited intrusion also is essential to protect paramount constitutional concerns—the right to receive a fair trial by an impartial jury and the right to present a complete defense—that cannot otherwise be protected through the usual safeguards. By standing idly by in hopes that this discrimination will be caught by other means, the judiciary becomes an accomplice in the erosion of "our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

The petition is an appropriate vehicle to consider the important question presented because the racial bias expressed in this case is so "extreme" that the "jury trial right has been abridged," *Warger*, 135 S. Ct. at 529 n.3., and the "plainest principles of justice" have been violated, *McDonald*, 238 U.S. at 269. If petitioner's case involving multiple statements of overt racial and ethnic bias does not fit neatly into *Warger*'s footnote 3, it is hard to imagine any constitutional limits on no-impeachment rules.

ARGUMENT

I. Racial and ethnic bias in jury deliberations erodes public confidence in a criminal justice system already plagued by racial disparity.

The fundamental importance of the question presented is beyond dispute. Pernicious bias in jury deliberations is a recurring and serious issue that casts doubt on the fairness and impartiality of our criminal justice system—a system that already faces significant racial disparity in the prison population. Although rules limiting the admissibility of statements made during jury deliberations are intended to protect the "community's trust in a system that relies on the decisions of laypeople," *Tanner v. United States*, 483 U.S. 107, 121 (1987), ignoring evidence of overt racial or ethnic bias has "precisely the opposite effect." Pet. App. 18a (Márquez, J., dissenting). It allows the "jury itself [to become] an instrument of oppression." 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure: Evidence* § 6074 (2d ed. 2007).

1. "Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (internal quotation marks omitted). "When Indians get alcohol, they all get drunk, and when they get drunk, they get violent." *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (internal quotation marks omitted). "[T]he defendants [were] guilty because they were of Arabic descent." *United States v. Shalhout*, 507 F. App'x 201, 203 (3d Cir. 2012) (internal quotation marks omitted). "I guess we're profiling, but [Hispanics] cause all the trouble." *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009) (internal quotation marks omitted). "All the niggers should

hang." *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (internal quotation marks omitted).

Each of these statements was expressed by a juror during deliberations in a criminal case. Each of these biases escaped detection during voir dire and throughout an ostensibly constitutional trial. And each statement is abhorrent to our judicial system and envelops each trial in an impermeable cloud of doubt. The petition presents a timely opportunity for this Court to decide the extent to which criminal defendants will be allowed to introduce such evidence of juror bias to challenge the fairness of their trials.

These statements are far from isolated incidents. In 2008, a state court considered the effect of a juror's declaration that "race was an issue from the inception of the trial." *Commonwealth v. Steele*, 961 A.2d 786, 807 (Pa. 2008). A co-juror had "noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty" and should "fry, get the chair or be hung." *Id.* at 807–08 (internal quotation marks omitted).

In another case, one juror called another a "nigger lover," a fact the defendant sought to introduce after the verdict. *Williams v. Price*, 343 F.3d 223, 225, 227 (3d Cir. 2003) (Alito, J.) (internal quotation marks omitted). The court of appeals stopped short of opining whether "testimony of the type at issue" could be constitutionally excluded under Federal Rule of Evidence 606(b)—the federal analog to CRE 606(b)—but nonetheless felt constrained, under the high standards applicable to habeas actions, to "hold only that the exclusion of such testimony does not contravene or represent an unreasonable application of clearly established federal law." *Id.* at 237.

And, here, one juror with a purported law enforcement background infected the jury with virulent statements of racial and ethnic bias: "'[The defendant] did it because he's Mexican and Mexican men take whatever they want.'" Pet. App. 4a. "'[N]ine times out of ten Mexican men [are] guilty of being aggressive toward women and young girls.'" *Id.* "'Mexican men [have] a bravado that cause[] them to believe they [can] do whatever they want[] with women.'" *Id.* The juror also allegedly stated his belief that defendant's alibi witness was not credible because he is "'an illegal.'" *Id.* at 5a. In point of fact, the alibi witness was a legal resident. Pet. 5.

2. These examples reflect only a small subset of instances where bias has poisoned jury deliberations. Both statistics and studies suggest a much more pervasive problem that results in significant racial disparity in our prison population.

At year-end 2014, 2.7% of black males and 1.1% of Hispanic males were serving sentences of at least one year in state or federal prison while less than 0.5% of white males were imprisoned. *See* Dep't of Justice, Bureau of Justice Statistics, E. A. Carson, Prisoners in 2014, at 15 & Table 10 (September 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf. In every age group, black males were imprisoned at a higher rate than white males. *See id.* Among inmates ages 18 to 19, black males were more than 10 times more likely, and Hispanic males nearly 3.5 times more likely, to be in state or federal prison than white males. *See id.* Between the ages of 30 and 34, 6.4% of black males and 2.5% of Hispanic males were imprisoned while just 1.1% of white males were imprisoned. *See id.*

Legal guilt alone does not explain these disparities. "Studies have shown that, controlling for legally

relevant differences, black defendants are more likely to be confined before trial, more likely to be sentenced to prison when non-prison sentences are available, and more likely to receive longer sentences than their white counterparts." *United States v. Valdovinos*, 760 F.3d 322, 332 (4th Cir. 2014) (Davis, J. dissenting) (citing Michael Tonry, *Punishing Race: A Continuing American Dilemma* 70–76 (2011); Cassia Spohn, Racial Disparities In Prosecution, Sentencing, and Punishment 166–93 (2013), in *The Oxford Handbook of Ethnicity, Crime, and Immigration* (S. Bucerius, et al., ed. 2013)). In other words, bias infects and affects every stage of criminal prosecutions.

3. Racial and ethnic bias in the jury room remains a real threat, one that often lurks undetected beneath the surface of a trial. "[S]ubstantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions." Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race & Juries? A Review of Social Science Theory & Research*, 78 Chi.-Kent L. Rev. 997, 1010 (2003).

Bias can be divided into two categories. Explicit bias is prejudice knowingly held. Once common, the United States has seen a "dramatic decrease" in explicit bias over the past several decades. Faye Crosby, Affirmative Action is Dead; Long Live Affirmative Action 202 (2004).

But a subtler form of bias persists, which is harder to identify or prevent during a trial. Implicit bias is "unstated and unrecognized and operate[s] outside of conscious awareness." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the*

Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 152 (2010). Referred to by social scientists as "hidden, cognitive, or automatic bias[]," implicit bias can lead the mind unintentionally to associate a trait with a person based solely on their race or ethnicity. *Id.*

Studies show that implicit biases are pervasive in this country, with a majority of individuals unknowingly harboring racial biases. *Id.* at 153. As two social scientists recently observed, "we are not, on average or generally, cognitively colorblind." Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 473 (2010). Studies indicate that implicit biases, no less than explicit biases, predict individual behavior and lead to discrimination.

These biases, both explicit and implicit, are prone to manifest in the jury room. In one recent study, social scientists examined whether altering the skin tone of a perpetrator in a security camera photo affected the way participants judged various pieces of trial evidence. Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 331 (2010). Using photos of a perpetrator with progressively darker skin color, the study found that mock jurors' evaluation of trial evidence was influenced by racial bias. This racial bias predicted guilty and not guilty verdicts, with mock jurors more likely to find darker-skinned perpetrators guilty than lighter-skinned counterparts. *Id.* at 337–39.

Another study evaluated whether implicit racial bias affects a juror's evaluation of ambiguous evidence. Justin Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not*

Guilty Implicit Association Test, 8 Ohio State J. Crim. L. 187, 190 (2010). The study suggested that mock jurors exhibited strong associations between black individuals and a guilty verdict (as compared with white individuals), and this implicit racial bias predicted how a juror evaluated ambiguous evidence. *Id.* at 204. That is, mock jurors appear to show an implicit racial bias that results in black men being afforded a weaker presumption of innocence. *Id.*

Other studies have found that mock jurors more easily recalled aggressive facts when the actor-defendant was black as opposed to white, and mock jurors rated the personality of different-race defendants as more violent as compared to same-race defendants. *See* Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L. J. 345, 350 (2007); Samuel Sommers & Phoebe Ellsworth, *Race in the Courtroom: Perceptions of Guilt & Dispositional Attributions*, 26(11) Personality & Soc. Psychol. Bull. 1367, 1370–71, 1374–76 (2000).

The documented effects of implicit bias in mock juries are likely to be magnified in an actual jury setting, where pressures run high and the consequences are real. Time-pressured or stressful conditions, situations involving complex problems, and situations involving ambiguity have been suggested as especially conducive to activating implicit bias. *See, e.g.*, Marianne Bertrand et al., *Implicit Discrimination*, 95(2) The Am. Econ. Rev. 94, 95–97 (2005); Barbara Reskin, *Unconsciousness Raising*, Q1 Regional Rev. 33, 34, 36 (2005); Dolly Chugh, *Societal & Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter*, 17(2) Soc. Just. Res. 203, 212, 216, 217 (2004). The context of jury

deliberations—which can and often does meet each of these criteria—provides a fertile ground for the influence of jurors' implicit biases.

In light of the impact that biases have on jurors' decision-making, courts should be permitted a reasonable degree of flexibility over whether to admit oral statements of racial or ethnic bias that are expressed in the jury room and that may have infected the verdict. While allowing a court to admit statements of potential bias in a jury room unfortunately cannot completely stamp out all racial and ethnic bias, it is a step towards reaching a more honest truth. As Reginald Rose said: "It's very hard to keep personal prejudice out of a thing like this. And no matter where you run into it, prejudice obscures the truth." Twelve Angry Men (Universal 1957). A court should not be complicit in furthering that obfuscation.

II. The admission of evidence showing juror bias during deliberations is necessary to protect the right to a fair trial.

No-impeachment rules like CRE 606(b) must yield to a defendant's constitutional right to an impartial jury and to present a complete defense where racial or ethnic bias infects a jury's deliberations.

1. "One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *Warger*, 135 S. Ct. at 528 ("The Constitution guarantees both criminal and civil litigants a right to an impartial jury."). The Sixth Amendment guarantees defendants the "right to be tried by a jury free from

ethnic, racial, or political prejudice, . . or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (internal citations omitted). The Constitution guarantees the right to a jury "without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992); *see also Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973). Indeed, the presence of a partial juror "violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The Colorado Supreme Court's application of CRE 606(b) runs headlong into the right to an impartial jury. If a juror fails to acknowledge racial or other bias during voir dire, manifestations of that bias are likely to arise only in statements made during deliberations. Pet. 22. Jurors are, after all, uniformly instructed not to discuss the case until deliberations begin. Barring the admissibility of statements reflecting improper bias during deliberations would effectively foreclose a defendant's best chance to show that prejudice robbed him of a fair trial.

In *Warger*, this Court found no constitutional hurdle in prohibiting post-verdict testimony regarding a juror's potential bias against a plaintiff involved in a car accident. 135 S. Ct. at 529. "[J]uror impartiality [was] adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* This Court noted, however, that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* at 529 n.3. In such a case, the Court left open the question whether

"the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.*

Tanner v. United States sets forth those "usual safeguards"—voir dire, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to report misconduct prior to the verdict, and the availability of alternative non-juror evidence to show misconduct. 483 U.S. at 127. While these safeguards may work to ensure "finality" and "full and frank discussion in the jury room," *id.* at 120, they fail to "protect the integrity of the process" where racial or ethnic bias is present.

The potential for partiality and the corresponding strength of the constitutional guarantee guarding against it are especially significant where racial or ethnic bias is concerned:

> Eradication of the evil of state supported racial prejudice is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict. Racial prejudice undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression. This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.

Wright & Gold, *Federal Practice & Procedure: Evidence* § 6074. Indeed, "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race." *Ham*, 409 U.S at 526–27.

Concern with the finality of judgments and jury harassment cannot trump the need for jury impartiality, which is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (internal quotation marks and citation omitted). "[T]he seating of any juror who should have been dismissed for cause . . . require[s] reversal." *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). In other words, juror partiality—particularly where it involves racial bias—is a "structural defect" that irretrievably taints a trial, making the need for a complete inquiry into juror impartiality more compelling than with respect to instances where a juror may be intoxicated, as in *Tanner*. *See Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) ("The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. . . . [T]he presence of a biased juror introduces a structural defect not subject to harmless error analysis.") (internal citations omitted). Of course, the Court need not decide the remedy for a case infected by unlawful bias. The limited question here is whether such evidence can simply be admitted.

Concern for "the community's trust in [the judicial] system," *Tanner*, 483 U.S. at 121, also compels a full and fair determination of whether a verdict was rendered based on bias rather than on the merits. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system." *Gray*, 481 U.S. at 668. Precisely because racial or ethnic prejudice in a jury room "is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice," courts must be allowed room to "correct any possible harmful effects" on criminal defendants. *United States v. Heller*, 785 F.2d 1524,

1527 (11th Cir. 1986). Those harmful effects are not isolated to criminal defendants, but "touch the entire community," including the jurors who are privy to another juror's prejudice. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). A juror may not only be gravely offended by the discrimination occurring within the jury room, but may lose confidence in a criminal justice system intended and reputed to be fair and impartial.

Given the paramount importance of eliminating racial and ethnic bias by juries and the inadequacy of other procedures to combat the issue, "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury." *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983). Many courts thus have refused to apply no-impeachment rules like CRE 606(b) "so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *Villar*, 586 F.3d at 87.

2. For similar reasons, no-impeachment rules also implicate the constitutional right to present a complete defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (internal citations omitted).

The right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate

to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). This right extends beyond the guilt or innocence phase of a trial. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding exclusion of certain testimony denied defendant fair trial on issue of punishment and constituted violation of due process clause). This Court has repeatedly confronted, and rejected, proposed applications of evidentiary rules that would violate a criminal defendant's right to present fundamental defenses. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 294–96 (1973); *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Precluding admission of juror testimony regarding racial bias during jury deliberations would infringe a weighty interest. "The right to . an impartial jury lies at the heart of due process," *Porter v. Illinois*, 479 U.S. 898, 900 (1986) (Marshall, J., dissenting from the denial of certiorari), and the right to object to jurors who "would be incapable of confronting and suppressing their racism" is paramount, *McCollum*, 505 U.S. at 58. If a party can "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial. *McDonough*, 464 U.S. at 556.

A defense would be inherently incomplete without the ability to introduce evidence that the jury's deliberation was infected with unlawful prejudice. Barring such evidence would be "disproportionate to the ends" the rule is "asserted to promote." *Holmes*, 547 U.S. at 326. Safeguarding the freedom of deliberations in the jury room, *see Tanner*, 483 U.S. at 120–21,

cannot "justify the limitation imposed" on a defendant's right to defend himself on the ground that his trial was fundamentally unfair, *Rock*, 483 U.S. at 56.

Moreover, courts should not apply no-impeachment rules "mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. "[I]t would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268–69 (internal quotation marks omitted). Preventing a criminal defendant from proving that his trial was infected with unlawful racial or ethnic bias would certainly "violat[e] the plainest principles of justice." *Id.* at 269 (internal quotation marks omitted).

3. Voir dire is the traditional method for ferreting out those impermissible biases that could obstruct a defendant's constitutional right to an impartial jury and to present a complete defense. But voir dire is an imperfect filter. Voir dire cannot discover jurors who are reluctant to reveal—or even eager to conceal—their explicit biases. And, voir dire is impotent to uncover implicit bias that even the juror does not know he harbors. "'Asking a general question about impartiality and race is like asking whether one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence.'" Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28, 43–44 (2015) (quoting Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1670 (1985)).

Because jurors harboring virulent or latent racial prejudices can and do slip through voir dire, the court's

ability to protect the fairness of criminal proceedings can sometimes depend on evidence of statements made during jury deliberations. This petition presents a critical opportunity to fortify—or an equally troubling occasion to erode—the Constitution's guarantee that criminal defendants will be tried based on their conduct, not their race or ethnicity.

Racial and ethnic bias has no place in a system of justice intended to be impartial. To preclude evidence of overt racial bias in a jury room—indeed, to refuse to even consider whether such bias has affected a jury's deliberations—casts further shadow on, and "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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